



September 24, 2001

Ms. Tracy B. Calabrese
Senior Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2001-4288

Dear Ms. Calabrese:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152296.

The City of Houston (the "city") received a request for copies of all documents pertaining to an altercation that occurred on a specified date between two particular individuals. You state that you are releasing some of the responsive information. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that certain information in Exhibit 4, which we have marked, is subject to section 552.022 of the Government Code. This information is subject to disclosure, unless it is expressly confidential under other law. Gov't Code § 552.022(a). One category of public information under section 552.022 is "a policy statement or interpretation that has been adopted or issued by an agency." Gov't Code § 552.022(a)(13). Two of the submitted documents in Exhibit 4 are policy statements that have been adopted by the city's Department of Solid Waste Management. You claim that these documents are excepted from disclosure pursuant to sections 552.103 and 552.111 of the Government Code. However, our

¹ We acknowledge your statement in your letter to us dated July 18, 2001 that you wish to withdraw your section 552.108 claim with regard to the submitted information. Accordingly, we do not address the applicability of section 552.108 of the Government Code with regard to any of the submitted information.

office has previously concluded that sections 552.103 and 552.111 are discretionary exceptions that do not make information confidential.² See Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111). Accordingly, you may not withhold the marked policy statements in Exhibit 4 from disclosure under section 552.103 or section 552.111 of the Government Code.

However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). For purposes of section 552.022 of the Government Code, an attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. See Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. See *id.* After reviewing the marked policy statements at issue in Exhibit 4, we conclude that none of this information constitutes attorney work product. Consequently, the city may not withhold the marked policy statements in Exhibit 4 from disclosure under Rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, these two policy statements must be released to the requestor.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). The city maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See* Gov't Code § 552.103(c).

A governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). You state, and provide documentation showing, that the requestor's client has filed an Equal Employment Opportunity Commission ("EEOC") complaint against the city and that the EEOC recently issued a right-to-sue letter to the requestor's client. Based on your arguments and our review of the submitted information, we conclude that litigation is reasonably anticipated in this matter and that the remaining submitted information is related to the reasonably anticipated litigation for purposes of section 552.103.

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.⁴ It appears that several of the submitted documents in Exhibit 4, which we have marked, have been obtained by the potential opposing party in this matter. Therefore, with the exception of the documents that we have marked, you may withhold the remaining submitted information from disclosure pursuant to section 552.103 of the Government Code.

However, you also claim that the documents that have been obtained by the requestor's client are excepted from disclosure as attorney work product pursuant to section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See* Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. Based on our review of the marked documents in Exhibit 4, we conclude that none of this information is excepted from disclosure under section 552.111, since it does not reveal an attorney's mental processes, conclusions, or legal theories. Accordingly, you must release the marked information in Exhibit 4 that has been obtained by the potential opposing party in this matter.

In summary, you must release the two marked policy statements in Exhibit 4 to the requestor pursuant to section 552.022(a)(13) of the Government Code. You may withhold most of the remaining submitted information from disclosure pursuant to section 552.103 of the Government Code. However, you must release to the requestor all marked documents in Exhibit 4 which have been obtained by the requestor's client.

⁴ Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald J. Bounds". The signature is fluid and cursive, with the first name "Ronald" and last name "Bounds" clearly distinguishable.

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 152296

Enc. Marked documents

cc: Ms. Johnna Teal
Law Office of Johnna Teal & Associates
5851 Southwest Freeway, Suite 107
Houston, Texas 77057
(w/o enclosures)